

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Brief April 13, 2007

**STATE EX REL. TRACY RENEE JACKSON v. SHANNON MICHAEL  
JACKSON**

**Appeal from the Chancery Court for Sumner County  
No. 2005D-99 Tom E. Gray, Chancellor**

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**No. M2006-00598-COA-R3-CV - Filed March 26, 2008**

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This appeal involves a chancery court's modification of a *pendente lite* child support order and the forgiveness of arrearages resulting from that order. Because the modified order was interlocutory by nature and therefore subject to modification at any time prior to the entry of a final judgment, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

Paul G. Summers, Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, for the appellant, State of Tennessee, Department of Human Services, ex rel. Tracy Renee Jackson.

Shannon Michael Jackson, not represented on appeal.

**OPINION**

**I. FACTS**

Tracy Renee Jackson ("Wife") and Shannon Michael Jackson ("Husband") were married on December 28, 1996. During the course of their marriage, Wife gave birth to two children: daughter V. in 1997 and son G. in 2003. On March 1, 2005, Wife filed for divorce in the Chancery Court of Sumner County, citing irreconcilable differences and inappropriate marital conduct on the part of Husband. On that same date, Wife filed for the approval of a temporary parenting plan, under which she would have custody of both children. On March 18, 2005, the parties filed an Agreed Order of Reconciliation suspending their divorce proceedings for six months, but Husband moved to revoke their stipulation of reconciliation and the order in May of 2005. The trial court vacated the stipulation and order.

On May 25, 2005, the trial court issued a *pendente lite* order naming Wife the primary residential parent of both children and requiring Husband to pay \$182.00 per week in child support beginning May 27, 2005. After Husband failed to make the required payments, Wife filed a Motion for Civil Contempt and Wage Assignment. She additionally filed a Motion for Default Judgment against Husband, due to his failure to respond to her original divorce complaint.

Husband filed an Answer and Countercomplaint to Wife's complaint for divorce on July 28, 2005. In his Answer, he called the paternity of G. into question and demanded strict proof that he was the child's biological father. On that same date, Husband filed a Motion to Correct Child Support, alleging that his temporary child support obligation had not been calculated consistently with state guidelines.

On August 11, 2005, the court issued an order holding Husband in contempt, granting Wife a judgment against him for \$1,274 in unpaid child support and denying Husband's Motion to Correct Child Support. After Husband's continued failure to make payments, the Tennessee Department of Human Services ("State") intervened on behalf of Wife, pursuant to Tenn. Code Ann. §§ 71-3-124(d) & 71-3-125. On October 27, 2005, the State filed a second petition for contempt, seeking a judgment against Husband for a total arrearage to date of \$3,276.00.

Subsequent DNA testing excluded Husband as the biological father of G. As a result of this finding, Husband and Wife executed a Marital Dissolution Agreement and Permanent Parenting Plan. After a hearing in chancery court, a Final Decree of Divorce adopting and incorporating those documents in full was entered on December 21, 2005, and the parties were granted a divorce on the ground of unreconcilable differences.<sup>1</sup> At the hearing, both the DNA evidence and an error in the court's prior calculation of child support (presumably the same error noted by Husband in his Motion to Correct Child Support) were addressed. Therefore, the adopted parenting plan provides only for daughter V. and requires Husband to pay the reduced amount of \$80.76 per week in child support for V. only.<sup>2</sup> The plan further provides, "[Wife] shall be awarded a judgment against [Husband] in the amount of \$1,319.48 for unpaid child support. All judgments previously entered in this matter shall be null and void in light of the fact that the child support was retroactively reduced due to the fact that only one child of the marriage belongs to the husband."

The following week, on December 30, the chancellor issued an "Order Nunc Pro Tunc Approving Temporary Parenting Plan." That order provided, in pertinent part:

This matter came on to be heard on May 25, 2005, upon, inter alia, Plaintiff Mother's Motion to Approve the Temporary Parenting Plan including the father's child support obligation for the parties alleged two children. The Father requested DNA genetic

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<sup>1</sup>The State was not given notice of this hearing.

<sup>2</sup>The court determined that Husband's original obligation for both children should have been calculated as \$171.00 per week, rather than \$182.00 per week.

testing as to the youngest child, [G.]. The genetic testing having been completed and finding that Defendant Husband is excluded as the biological father of [G.].

The Court finds as follows:

1. Defendant Husband, Shannon Michael Jackson is excluded and is in fact not the biological father of [G.].
2. The temporary support set as of May 27, 2005 by order dated May 25, 2005 is adjusted to reflect Defendant Father's obligation to provide support for only one child being [V.].

It is so **ORDERED** and **ENTERED** nunc pro tunc as of May 25, 2005 this 30th day of December 2005.

That order found that Father had requested DNA testing as to the younger child and the testing had excluded Father as the biological father of G. It further provided, "the temporary support set as of May 27, 2005 by order dated May 25, 2005 is adjusted to reflect Defendant Father's obligation to provide support for only one child . . . ." The trial court ordered that this order be entered *nunc pro tunc* as of May 25, 2005.

Meanwhile, apparently unaware of these developments, the State appeared in court on January 5, 2006, to pursue the second civil contempt petition against Husband.<sup>3</sup> Perhaps in response to the State's action, Husband filed a Motion to Reconsider and Correct the court's prior ruling on his July 28, 2005, Motion to Correct Child Support, alleging that "by his simultaneously filed Answer and Counter Complaint, Defendant Father denied he was the biological father of one of the children" and noting that subsequent DNA testing excluded Husband as the child's biological father. The State followed by filing a Motion for Relief from Judgment, challenging the partial nullification of Husband's child support obligation in the final decree of divorce as an unlawful retroactive modification of a child support order under Tenn. Code Ann. § 36-5-101(f)(1).

On February 21, 2006, the trial court issued an order containing the following findings of fact:

1. On May 25, 2005, the Plaintiff Mother's Motion for approval of a Temporary Parenting Plan came on for hearing and was considered by the Court.
2. Plaintiff, Tracy Renee Jackson was present at said hearing with her father, Mr. Fentress.
3. Plaintiff Mother, Tracy Renee Jackson testified that there were two children born during the marriage and that Defendant Father was the father of both children.
4. Based upon this sworn testimony regarding the parties' income, temporary child support was set as reflected by this Court's Order of May 25, 2005.

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<sup>3</sup>Wife did not appear at this hearing, despite having notice. The chancery court agreed to continue the matter of contempt at the request of the State.

5. On December 21, 2005, at the final hearing of this cause, Plaintiff, Tracy Renee Jackson appeared with counsel and presented the Court with a Marital Dissolution Agreement and Proposed Permanent Parenting Plan. The proposed Parenting Plan, signed by Plaintiff Mother, provided for Defendant Father to pay support for only one child, resultant of the conclusion of the DNA testing, evidence of which was presented to the Court.
6. The Court finds that Plaintiff had inaccurately testified at the May 25, 2005 “Pendite Lite” hearing inasmuch as she testified that Defendant Husband was the father of both children. Plaintiff Wife knew or should have known as to the paternity of both children and testified wrongfully.
7. In calculating the support on May 25, 2005, the Court erred inasmuch as the Father's monthly child support obligation for both children should have been set at \$741.00 per month.
8. The child support calculation was furthermore erroneous due to Plaintiff Mother's inaccurate testimony that Defendant Father was the biological father of both children.

Based on these findings, the chancellor granted Husband’s Motion to Correct Child Support. The court denied the State's Motion for Relief from Judgment, concluding that the adjustment of child support was “not ‘retroactive’ within the meaning of” the Tennessee statute because: “(1) The mother knew or should have known the paternity of her children and testified wrongfully to the Court; (2) the Court based its temporary child support order on this erroneous testimony; and (3) in his initial responsive pleading, Defendant Father denied paternity and thereafter rebutted the presumption of paternity by DNA testing.” The State appeals this judgment.

## **II. STANDARD OF REVIEW**

The trial court's conclusions of law are reviewed “under a pure de novo standard of review according no deference to the conclusions of law made by the lower courts.” *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569-70 (Tenn. 2002); *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). Our review of the trial court's findings of fact is de novo upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 569-70; *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 569-70; *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). No transcript of the hearings or statement of the evidence has been filed herein.

## **III. ANALYSIS**

The State argues that the chancery court’s adoption of the permanent parenting plan reducing child support arrearages constitutes the unlawful retroactive modification of a child support order

under Tenn. Code Ann. § 36-5-101. That section provides that an order for child support “shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.” Tenn. Code Ann. § 36-5-101(f)(1). The forgiveness of arrearages in child support cases qualifies as such a modification. *Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991) (applying the predecessor to § 36-5-101, former Tenn. Code Ann. § 36-5-101(a)(5)).

Prior to the 1987 enactment of the language quoted above, courts could retroactively modify a final child support order “when the facts of the case require such a modification retroactively in order to meet the ends of justice.” *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 837 (Tenn. Ct. App. 1997). However, passage of the statute eliminated equitable defenses to claims for past due support that would have the effect of retroactively modifying a child support obligation. *Id.*; *Rutledge v. Barrett*, 802 S.W.2d 604, 607 (Tenn. 1991).

Consequently, the statute prohibits retroactive modification, prior to a petition for modification, of a final support order even where later paternity testing establishes that the support obligor is not the father of the child. *See, e.g., Whitley v. Lewis*, No. 2007 WL 2117682 (Tenn. Ct. App. July 24, 2007) (Tenn. R. App. P. 11 application denied Nov. 19, 2007) (holding, where the obligor had filed a voluntary acknowledgment of paternity and his parentage and duty and amount of support had been set two years before he became suspicious he was not the father and filed a motion for testing and relief from support, the trial court could not retroactively forgive the arrearage accruing before the modification petition was filed).

According to the State, any modification of Mr. Jackson’s child support obligation made effective prior to January 18, 2006 – the date on which it received notice of Mr. Jackson’s Motion to Reconsider and Correct his previously denied Motion to Correct Child Support - would be unlawful under § 36-5-101(f)(1).

While the statute makes it clear that a court cannot retroactively modify the amount of child support when that amount has been set in a final order, the statute’s applicability to a pendente lite, or temporary, support order is not as clear. The May 25, 2005, order setting pendente lite support was an interlocutory order, rather than a final judgment. As provided in the Tennessee Rules of Civil Procedure,

. . . any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is **subject to revision at any time** before the entry of the judgment adjudicating all the claims and the rights and liabilities of the parties.

Tenn. R. Civ. P. 54.02. (emphasis added). In other words,

[a]n interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties’ rights with regard to the issue, leaving

nothing else for the trial court to do. Until a judgment becomes final, it remains within the court's control and may be modified any time prior to the entry of a final judgment.

*McAllister*, 968 S.W.2d at 840 (Tenn. Ct. App. 1997) (citations omitted).

The May 26, 2005 order requiring Husband to pay \$182.00 per week in child support was made in response to Wife's Motion to Approve Temporary Parenting Plan, and clearly was not intended as a final judgment. It was denominated "temporary" and later described by the chancellor as a pendente lite order. The case before us was not an action to establish paternity. Instead, it was a divorce case, involving a number of issues and potential results. Wife made multiple claims for relief, including a claim for divorce, claims for the approval of both temporary and permanent parenting plans, and a claim for the exclusive possession of the marital residence. The pendente lite support order, coming early in the divorce litigation, did not resolve all the claims between the parties, including the obligation to support G., and, thus, it is not a final order. Tenn. R. Civ. P. 54.02; *Fox v. Fox*, 657 S.W. 747, 749 (Tenn. 1983).

In *Fox v. Fox*, the Tennessee Supreme Court held that an order "allowing \$150 attorneys' fees pendente lite" in a divorce action was an interlocutory order that had not become final prior to entry of the final decree of divorce resolving all the issues between the parties and, therefore, was subject to modification. 657 S.W.2d at 749. "[Such an] order is interlocutory and can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties." *Id.* (citing *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 325 (Tenn. 1982)).

Thus, as a general rule a court has the authority to retroactively modify a temporary or interlocutory order. We see no reason why a pendente lite support order should be treated differently from a pendente lite attorney fee order, which is in the nature of alimony, as far as its modifiability prior to entry of a final judgement. The question, however, is whether such an order can be retroactively modified, as authorized in Tenn. R. Civ. P. 54.22, so as to reduce a child support arrearage, in light of Tenn. Code Ann. § 36-5-101(f)(1). We conclude that, at least in the circumstances of the case before us, it can.

As set out above, the statute prohibits "modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties." Tenn. Code Ann. § 36-5-101(f)(1). Clearly, then, modification as to amounts due under a prior order are authorized retroactively to the date a petition for modification is filed. Thus, a party entitled to a modification is not prejudiced by a delay in hearing or final resolution of the modification petition.

In the case before us, Husband filed an answer disputing his paternity of G. and sought a DNA test. While that pleading may not technically have been a petition or action for modification, it was appropriate procedurally and, in our opinion, accomplished the same purpose. The demand for proof of paternity, with its concomitant denial of liability for support if parentage was not established, gave Mother and the trial court notice of Father's claim that he was not legally responsible for support for

G. The temporary order establishing pendente lite support was intended to provide support until the issue of paternity could be resolved. A DNA test was subsequently performed, and the results excluded Father as the child's biological father, but such steps and their presentation to the court take time.

At the time the answer was filed, the State was not a party to this divorce litigation. It is not disputed that Mother received notice of the answer and counterclaim. The state argues that Father's post-judgment Motion to Reconsider was his request to modify support that established the earliest date to which any modification could be made under the statute. For the reasons set out above, we disagree.<sup>4</sup>

#### IV. CONCLUSION

We therefore affirm the judgment of the chancery court in all respects and remand this matter with the costs taxed to appellant, the State of Tennessee ex rel. Tracy Renee Jackson.

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PATRICIA J. COTTRELL, J.

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<sup>4</sup>We also note that the trial court actually replaced the original Temporary Parenting Plan that included a *pendente lite* support obligation with an order that reflected the facts of the situation which were determined during the course of the litigation. The entry of that Order *Nunc Pro Tunc*, if valid, obviates any objection to the approval in the Final Decree of the Permanent Parenting Plan. The State, however, does not challenge the *Nunc Pro Tunc* Order, or its nature, in this appeal. However, if a court cannot retroactively modify an interlocutory order of support, use of a particular procedural method cannot give the court that authority.